(13)

No. 95-813

In The

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

vs.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICAN HOMEOWNERS FOUNDATION AMERICAN LAND RIGHTS ALLIANCE AS *AMICI CURIAE** IN SUPPORT OF PETITIONERS

NANCIE G. MARZULLA
LISA M. JAEGER
BARRY C. HODGE
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC
20015-2405
(202) 686-4197

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BRIEF *AMICI CURIAE* OF

CENTER FOR THE DEFENSE OF FREE ENTERPRISE,
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS,
COALITION TO PROTECT AND PRESERVE PRIVATE PROPERTY RIGHTS,
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION,
FRONTIERS OF FREEDOM,
HILL COUNTRY HERITAGE ASSOCIATION,
INDEPENDENT FOREST PRODUCT ASSOCIATION,
MAINE CONSERVATION RIGHTS INSTITUTE,
NATIONAL ASSOCIATION OF MANUFACTURERS,
NATIONAL COALITION FOR PUBLIC LANDS AND NATURAL RESOURCES (PEOPLE FOR THE WEST!)
NATIONAL HARDWOOD LUMBER ASSOCIATION,
NATIONAL WILDERNESS INSTITUTE
OREGONIANS IN ACTION LEGAL CENTER,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
SOUTHEASTERN LUMBER MANUFACTURERS ASSOCIATION,
TEXAS JUSTICE FOUNDATION,
TEXAS WILDLIFE ASSOCIATION,
TRANS TEXAS HERITAGE ASSOCIATION, and
DEFENDERS OF PROPERTY RIGHTS

QUESTION PRESENTED FOR REVIEW

Whether a court may pick and choose among those provisions which it will allow to be enforced by way of a citizens suit provision?

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NATIONAL COALITION FOR PUBLIC LANDS AND NATURAL RESOURCES (PEOPLE FOR THE WEST!) NATIONAL HARDWOOD LUMBER ASSOCIATION, NATIONAL WILDERNESS INSTITUTE OREGONIANS IN ACTION LEGAL CENTER, PENNSYLVANIA LANDOWNERS' ASSOCIATION, SOUTHEASTERN LUMBER MANUFACTURERS ASSOCIATION, TEXAS JUSTICE FOUNDATION, TEXAS WILDLIFE ASSOCIATION, TRANS TEXAS HERITAGE ASSOCIATION, and DEFENDERS OF PROPERTY RIGHTS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, the *amici curiae* submit the brief in support of Petitioners. Consent to the filing of this brief has been granted by counsel for Respondents and counsel for Petitioners, and has been lodged with the Clerk of this Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Constitution worthless. Defenders mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual rights and liberties.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF believes that home owners' constitutional rights are the primary concern when enacting regulations and therefore must be protected by elected and appointed officials and the judicial system.

American Land Rights Association (Battle Ground, WA) is a non-partisan grassroots coalition of farmers,

ranchers, private property owners, rights holders, loggers, miners, and outdoor recreation advocates in or near federally managed areas or who are affected by federal land use or environmental laws and regulations.

Center for the Defense of Free Enterprise (Bellevue, WA) is a non-profit foundation engaged in the study of issues, economic trends, and governmental regulations as they relate to the operation of the free market. CDFE is dedicated to defending the right of individual American citizens and businesses to participate in the free market without the unmerited hindrance of the government, and seeks to further promote free market principles within contemporary American society.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees provided in the Bill of Rights. CCPR engages in public advocacy projects that foster an awareness of programs that violate the United States Constitution by eroding private property rights. CCPR played a major role in promoting the enactment of strong property rights protections at the state level in 1995.

Coalition to Protect and Preserve Private Property Rights (Bakersfield, CA) is a non profit corporation organized and existing under the laws of the State of California whose mission is to educate and assist private property owners in the protection and preservation of their right to owns and use private property as afforded by the United States Constitution, The Bill of Rights, and as an American Ideal.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas. The Association supports private property rights protection through research, public education, and other activities. Its mission embraces conservation of natural resources in conjunction with respect for private property rights, which underlie all other individual liberties.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded by Senator Malcolm Wallop to promote the basic ideas of the Founding Fathers as articulated in the Constitution to ensure the maximum amount of individual and economic freedom for every American.

Hill Country Heritage Association (Lampasas, TX) was formed in response to the proposed dedication of twelve Texas counties as habitat for an endangered species. Members of HCHA embrace the concept and practice of the conservation of natural resources in conjunction with respect for individual property rights.

Independent Forest Products Association (Portland, OR) represents small independent forest products manufacturers in the western, inter-mountain, and upper midwestern states who are dependent on federal lands for a stable timber supply. Many of IFPA's members are family-owned businesses located in rural communities that rely on timber as the economic backbone of their long-term business outlooks.

Maine Conservation Rights Institute (Lubec, ME) is a research and educational institute serving the land-owning public of Maine. MECRI keeps landowners informed of government policy, including proposed and existing programs that undermine private property rights. MECRI encourages private conservation and wise use land policies. MECRI is also the sponsor of the annual Conservation Rights Congress, which addresses contemporary land rights issues.

National Association of Manufacturers (Washington, DC) is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM supports the rights of private property owners and believes that all federal statutes, rules, and regulations impacting private property must be applied in a fair and just manner according to mandated legislative authority.

National Coalition for Public Lands and Natural Resources (Pueblo, CO) -- popularly known as People for the West! -- is a non-profit, grassroots organization formed to create a coalition to promote multiple use on public lands, individual private property rights, and the responsible production of our nation's natural resources. Its over 20,000

members advocate policies that balance environmental protection with economic growth.

National Hardwood Lumber Association (Memphis, TN) is a non-profit trade association composed of over 1,300 member firms who produce, sell, and use hardwood lumber. For almost a century, NHLA has maintained an order, structure, and ethical framework for the hardwood marketplace, and promoted the responsible stewardship of hardwood forests. It also plays a prominent role in educating lawmakers and the public about good forest management and the importance of private property ownership.

National Wilderness Institute (Washington, DC) is a national public interest group dedicated to the wise management of natural resources, unique and specific wildlife habitat, and wetlands. NWI encourages environmentally sound, site- and situation-specific practices that harness the dynamic and creative forces of the private sector -- including protection of private property rights -- and that reduce the regulatory burden of the federal government. NWI has applied a significant amount of its resources to the study and analysis of the impact of the Endangered Species Act on private property.

Oregonians in Action Legal Center (Tigard, OR) is a nonpartisan, non-profit, public interest law center involved in litigation to protect the constitutional rights of landowners and counter excessive land use regulation. It is financed entirely through the voluntary contribution of time and money from individuals, families, businesses, and foundations on a

continuing basis. OIA-LC successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. Tigard*.

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate the citizens of the Commonwealth of Pennsylvania about the threat to their property and personal freedom posed by increasingly intrusive regulations on land use, to generate public debate on the issue, and develop and implement a strategy to restore reason and balance to environmental regulation.

Southeastern Lumber Manufacturers Association (Forest Park, GA) is a non-profit trade association representing more than 380 independent lumber manufacturers in fifteen southeastern states. Its purpose is to promote the interests of its membership of small sawmill and planning mill operators. The timber supply on which their mills depend comes from both public and private lands throughout the southeast, a region most notably affected by the National Forest Service regulations to maintain the habitat of the "endangered" red-cockaded woodpecker.

Texas Justice Foundation (San Antonio, TX) seeks, through litigation and education, to protect the fundamental rights essential in providing and maintaining a bulwark of freedom for the individual against excessive government intrusion into their homes, affairs, and businesses. TJF provides legal representation to protect individual rights, limit government to its appropriate role, and promote a better business climate for job growth in Texas.

Texas Wildlife Association (San Antonio, TX) was formed in 1985 to serve as an advocate for the benefit of wildlife and for the rights of wildlife managers, landowners, and hunters in educational, scientific, political, regulatory, legislative, and legal arenas. It is a non-profit organization whose membership controls (either through ownership or leasing or consulting obligations) millions of acres of wildlife habitat in Texas. Its members are dedicated to the maintenance, management, and enhancement of wildlife habitat on private land. Its mission is to insure that wildlife -- especially on private property -- remains an enduring part of Texas.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and that environmental regulations and zoning restrictions often unreasonably limit private property ownership and development.

STATEMENT OF THE CASE

In the early 1900's the Bureau of Reclamation (Bureau) built reservoirs in northeastern California and southern Oregon for the purpose of providing irrigation water to farmers and ranchers in southern Oregon. This water system, known as the Lamath Project, includes Clear Lake and Gerber reservoirs, which are located in the project's eastern portion.

Throughout the century the Bureau has stored and released water from Clear Lake and Berber reservoirs pursuant to procedures which have remained essentially the same for decades. These long-standing practices have resulted in a steady supply of water relied upon by farmers and ranchers for decades.

Among those who rely on this water supply are Petitioners, Brad Bennett and Mario Giordano, who ranch in southern Oregon. Their ranching operations depend directly on their ability to receive irrigation water from Clear Lake and Gerber reservoirs. Changes in water management of these reservoirs directly affects the irrigation districts and the economic interests and property rights (water rights) of the ranchers who have petitioned for review of the decision below.

Due to concerns about population declines of two endangered species of fish (the Lost River Sucker and the shortnose sucker) in the western portion of the Klamath Project, the Bureau consulted with the United States Fish and Wildlife Service (Service), in accordance with the Endangered Species Act ("ESA" or "Act"). The ESA provides that in determining critical habitat for an endangered species the economic impact of such a determination must be considered. (16 U.S.C. § 1533(b)(2)). Furthermore, if economic adverse impact is determined, then reasonable and prudent alternatives are to be suggested in order to preserve the endangered species. (16 U.S.C. § 1536 (b)(3)(A)).

The Service rendered a biological opinion stating that Clear Lake had relatively stable sucker populations because the habitat was different from that in the western portion of the Klamath Project. The biological opinion reached a similar conclusion regarding Gerber Reservoir. However, the Service concluded that long term operation of the Klamath Project was likely to threaten extinction of two species of fish. One of the Service's recommendations was that the Bureau maintain a minimum water level in both Clear Lake and the Gerber Reservoir in order to preserve the fish. The Bureau agreed with this recommendation and decided to implement it as a reasonable, prudent alternative.

Contrary to Section 4 of the ESA, the Service did not consider the economic impacts of its decision on the Petitioners and their water rights in rendering its biological opinion. Thus, the biological opinion prepared by the Service did not reflect the fact that maintaining the recommended minimum water level will jeopardize Petitioners' ranching operations as well as adversely affect the ability of the irrigation districts to provide a reliable supply of water to farmers and ranchers in their districts.

Faced with the extinction of their livelihoods and the loss of their property rights, Petitioners as well as the irrigation districts filed a "citizen's suit" in federal district court under Section 11 (g)(1) of the ESA. Petitioners' suit was dismissed by the district court. The U.S. Court of Appeals for the Ninth Circuit upheld that dismissal on the ground that Petitioners'

economic interests did not fall within the "zone of interests" protected by the ESA.

SUMMARY OF ARGUMENT

As Justice Marshall once stated, courts have "no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). The language of the ESA citizen's suit provision at issue in this case plainly purports to confer jurisdiction upon the Petitioners:

"[A]ny person" may sue "the United States or any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this Chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540 (g)(1).

Nevertheless, the court below upheld dismissal of the Petitioners' challenge to a biological opinion which serves as the basis of critical habitat designation and which threatens to infringe Petitioners' constitutionally protected property rights (water rights), even though the Endangered Species Act itself plainly states that such interests are to be taken into account in designating critical habitat. Ignoring both the citizen's suit provision itself and the other provisions of the Act, the court below focused on the reason why the ESA was enacted -- clearly to protect endangered species. The court below then simply excised from enforcement any provision from the Act which the court believed did not further that purpose. Specifically, the court believed that economic interests and property rights (water rights) do not further the purposes of

endangered species protection, and it therefore excluded as enforceable those provisions in the Act.[1]

The court below asserted that it was entitled to inquire into the motives of the plaintiffs seeking to enforce the Act because of an applicable prudential test of standing -- the zone of interest test. Namely, the court below concluded that the motives of the Petitioners were not to protect endangered species, because Petitioners were seeking to protect their economic interests, and the court believed those interests are unrelated to protection of endangered species.

The "zone of interest" test precludes standing to a person who rests his claim on the legal rights of others, "even when the plaintiff has alleged [personal] injury sufficient to meet the 'case or controversy' requirement." *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). The zone of interest test is normally used as an interpretative aid in ascertaining who is within the regulatory circle of the statute, where Congress has not provided a statutory cause of action. *See, e.g., Ass'n of Data Processing Serv. Organiz., Inc. v. Camp.*, 397 U.S. 150, 154 (1979); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400 (1987)(National Bank Act contained no citizen's suit

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[1] The logical implication of the holding by the court below is that *no* persons has standing to a citizen's suit -- only plants and animals do. As the court below rightly observed, the Endangered Species Act is intended to protect species of plants and animals other than human beings -- a goal which benefits all persons equally. Nothing in the Act suggests that protection of the short-nosed sucker is intended to benefit one class of *persons* more than another. Thus all persons possess an equal right to enforce the functioning of the ESA according to the requirements of the statute and regulations -- or no one does. To date, this Court has never held that animals or plants possess legal rights enforceable against human beings or the government.

provision so court applied the "zone of interest" test to determine whether plaintiffs had standing to bring suit). However, contrary to the court below's application, the zone of interest test is not a means whereby the court can avoid engaging in the usual rules of statutory construction. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, No. 95-340, 1996 U.S. LEXIS 2956, at * 9 (U.S. May 13, 1996).

Put another way, the question that should have been asked by the court below is not *why* the ESA was enacted, but *how* did Congress decide endangered species should be protected. That question is answered by looking to the statute itself. As the Act reveals, Congress chose one way of protecting endangered species; it enacted a complex regulatory scheme containing eleven different sections. For example, Congress defined "take" in Section 7. Other sections relate specifically to private property rights and economic interests at issue in this case. For example, Section 5 sets up a federal land and water rights acquisition program and Section 4 specifically states that economic interests are part of the critical habitat designation process.

The citizen's suit provision contained in the ESA gives the right to enforce the entire statute, not just those provisions which the court believes should be enforced. Not only does selective enforcement of the Act vitiate congressional intent that all eleven provisions of the ESA be enforced, but selective enforcement destroys the balancing of interests which takes place in the legislative process and which is reflected in the

entire statute. Put simply, the Act reflects Congress' understanding as to the best way to protect endangered species by ensuring that economic and constitutional rights likewise be protected within the context of achieving that goal. The court cannot unilaterally decide for itself how it believes endangered species should be protected. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 352-53 n.4 (1984)(structure of Agricultural Marketing Agreement Act of 1937 implied that Congress did not intend to allow consumer challenges to Secretary's market orders). However, the court below chose to substitute its own belief as to how endangered species should be saved and simply refused to enforce those provisions which it believed would not lead to saving endangered species.

The court below also pointed to two other environmental statutes as a basis for concluding that persons with economic interests should not have standing to sue to enforce environmental statutes. However, neither of those two statutes have citizen's suits similar to the provision in the ESA. For example, the citizen's suit provision in the Clean Water Act (Federal Water Pollution Control Act)(CWA), states that "any person" shall have standing to sue "any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . ." FWPCA § 505 (a)(1), 33 § 1365 (a)(1). Given the more narrowly focused citizen's suit provision in the CWA, it is no surprise that the court concluded as it did in

Dan Caputo Co. v. Russian River County Sanitation, 749 F.2d 571 (9th Cir. 1984), that a plaintiff alleging that it was deprived of grant funds lacked standing under the CWA to sue. Likewise, NEPA has no citizen's suit provision at all; challenges brought pursuant to that Act must be brought under the Administrative Procedures Act. *See Nevada Land Action Ass'n. v. United States Forest Service*, 8 F.3d 713 (9th Cir. 1993). *But see Catron County Bd. of Commr's v. United States*, No. 94-2280, 1996 U.S. App. LEXIS 1479, at * 5 (10th Cir. Feb. 2, 1996).

Finally, the question of how Congress intended to protect endangered species is answered by looking at the statute. Here the court below again erred. Looking to the citizen's suit provision itself and to the various provisions of the Act which Congress intended to be enforced, the Petitioners in the instant action are well within the regulated community under the ESA.[2] The biological opinion, by limiting use of the waters of the Lake and Reservoir, regulates Petitioners directly since a draw-down of the waters would be a "take" in violation of Section 9 of the ESA. Further, contrary to the court below's assertion, the zone of interest test applies only where the plaintiff himself is not regulated. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

In short, just as the court below would have erred had it enlarged its jurisdiction to grant standing to a plaintiff outside

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[2] The court below erroneously stated that "[n]one of the plaintiffs is directly subject to the regulatory action. Rather, it is the Bureau of Reclamation which would be required to act if any rules regarding reservoir water levels are ultimately adopted." Pet. App. at 6 n.2.

the scope of the ESA, the court below erred by collapsing its jurisdiction to suit its own preferences. Congress drafted the ESA and the court's role is simply to enforce the Act as written. U.S. Const. art. I, § 7. Because the court below failed to do this, and in so doing has concocted a rule of standing which vitiates the balancing of interests contained in the Act designed to foster protection of endangered species, the decision below should be reversed.

ARGUMENT

I. THE ROLE OF THE COURT IN ENFORCING CITIZEN'S SUITS PROVISIONS IS TO UPHOLD THE INTENT OF CONGRESS AS EVIDENCED BY THE LANGUAGE OF THE ACT.

The citizen's suit provision contained in the ESA and at issue in this case is one of the broadest standing provisions imaginable. Indeed, it is hard to envision an aggrieved individual who, having satisfied Article III standing requirements,[3] would not be entitled to sue under the ESA citizen's suit provision:

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[3] Clearly Congress cannot confer standing to sue beyond the constitutional requirements of "case or controversy." But the court below takes this obvious point and erroneously concludes that Congress cannot confer standing co-terminus with Article III standing, as it seems to have done with the ESA citizens suit provision: "We note that, whether or not the zone of interests test applies, the class of plaintiffs that Congress had in mind was necessarily more limited than the literal language of the citizen suit provision suggests. As *Lujan* makes clear, Congress may not permit suits by those who fail to satisfy the constitutionally mandated standing requirements. For that reason, suits under the ESA, no less than suits under any statute, are clearly not available to 'any person' in the broadest possible sense of that term." Pet. App. at 8-9 n. 4.

> Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf --
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

(16 U.S.C. § 1540(g)(1)).

This Court has recently held that courts are to construe strictly such language, rather than speculate as to whom Congress intended have standing to enforce the statute: "Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." *United Ford and Commercial Workers Union, Inc.*, No. 95-340, 1996 U.S. LEXIS 2956 (U.S. May 13, 1996).

Nevertheless, the court below engaged in analysis expressly rejected by this Court and refused to implement the plain language of the ESA holding instead that "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." Pet. App at 11. According to the court below, courts are free to ignore the plain language of a citizen's suit provision if the court believes that the language chosen by Congress interferes with the court's view as to the "real" purpose of the statute in question:

> In light of our consistent use of the zone of interests test in determining the standing of

> plaintiffs who have sued under citizen-suit provisions, we hold that the ESA does not automatically confer standing on every plaintiff whose satisfies constitutional requirements and claims a violation of the Act's procedures. A contrary ruling would permit plaintiffs to sue even though their purposes were plainly inconsistent with, or only 'marginally related' to, those of the Act.

Id.

Employing the "zone of interest" test, a judicially imposed limitation on standing that is "malleable" by Congress, the court below ignored the text of the ESA and instead turned to court decisions, specifically *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) and *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995), for discerning the intent of Congress in passing the ESA. However, even when analyzing this prudential standing question, this Court has held that the starting point for determining whether a plaintiff's claim is within a statute's zone of interest can only be determined by looking at the statute itself. *United Food and Commercial Workers Union, Inc.* v. *Brown Group, Inc.*, No. 95-340, 1996 U.S. LEXIS 2956 (U.S. May 13, 1996).

By failing to follow the rules of statutory construction the court took the overall goal of the ESA -- which is obviously to protect endangered species -- and simply refused to enforce those provisions of the Act which the court believed were inconsistent with that purpose. Indeed, rather than focusing on the means chosen by Congress to protect endangered species, the court below tried to explain away the plain

language of the Act, to the point of absurdity: "Certainly, [Congress] did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." Pet. App. at 17.

However, the role of the court is not to come up with its own means of accomplishing a statute's objective; rather, its role is to effectuate the means chosen by Congress. Contrary to the view expressed by the court below, under our constitutional scheme, the function of courts when dealing with the meaning of a statute is limited to ascertaining and effectuating the meaning of the statute. Only when the language of the statute is vague or ambiguous on its face is it appropriate for the court to inquire into legislative history. As Justice Frankfurter once cogently observed, statutory interpretation is not "an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will' -- his caprices, fixed notions, even statesmanlike beliefs in a particular policy." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 529 (1947).

Thus, the only acceptable evidence of the meaning of a statute is the text of the statute itself, read in the context of the entire statute, including any legislative purpose articulated in that statute, and legislative history. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 372 (1986)("[t]he 'plain purpose' of the legislation . . . is determined in the first instance with reference to the plain language of the statute itself."). As the *Board of Governors*

Court went on to explain, failure of the court to interpret the statute as written vitiates the compromises and balancing of interests that goes into crafting every complex statutory scheme: "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id. See also Garcia v. United States*, 469 U.S. 70, 78 (1984)(This Court stated that it was "not willing to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended.").

The court below completely failed to give effect to the plain language of the citizen's suit provision contained in the ESA and instead substituted its own narrow "gestalt judgment" as to how it believed endangered species should be protected. In so doing, the court below has destroyed Congress' clear intent to accomplish conservation of endangered species through a statutory program which also protects the economic interests and constitutional property rights of individuals -- such as the Petitioners in this action.

As this Court just held on May 13, 1996, in a case involving the right of plaintiffs to sue to enforce the Worker Adjustment and Retraining Notification Act: "As we noted in *Warth*, prudential limitations are rules of 'judicial self-governance' that Congress may remove . . . by statute.' . . . It has done so without doubt in this instance." *United Food and Commercial Workers Union, Inc.* v. *Brown Group, Inc.*, No.

95-340, 1996 U.S. LEXIS 2956, at *23 (U.S. May 13, 1996).

Likewise, in the instance case, Congress has without doubt removed the prudential limitations to Petitioners' right to sue to enforce the ESA.

II. PROTECTING PRIVATE PROPERTY RIGHTS AND ECONOMIC INTERESTS FURTHERS THE INTENT OF CONGRESS TO PROTECT ENDANGERED SPECIES.

In 1973 Congress enacted the ESA, which was this nation's first attempt to achieve by law protection of endangered and threatened species of floral and fauna. The Act made clear, however, success depended upon all sectors of our society -- both public and private -- being involved in achieving that purpose. Hence, there are various provisions in the Act which address issues of private concern; notably, economic interests and private property rights.

Through the decades of enforcement, the Act's balanced approach to achieving protection of endangered species has been underscored. Recently Secretary of the Interior Bruce Babbitt discussed the importance balancing of interests reflected in the ESA in achieving its goals as reflected in the Act's habitat conservation plan program:

"The Balcones Canyonlands Conservation Plan is part of the Administration's focus on using the flexibility of the Endangered Species Act to find cooperative solutions that protect species. More than 140 habitat conservation plans that balance development with species protection under the

Endangered Species Act are now in place." 1996 WL 222408 (D.O.I.)[4]

The decision below destroys that balance reflected in the Act by closing the door to its full enforcement as envisioned by Congress.[5]

A. THE ESA IS DESIGNED TO CONSERVE ENDANGERED SPECIES AND IS ALSO PROTECTIVE OF ECONOMIC INTERESTS AND PROPERTY RIGHTS.

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[4] Habitat conservation plans created pursuant to the Act are an important way that balancing of interests are achieved under the Act. For example, with respect to the recently approved Balcones Habitat Conservation Plan commentators have observed: "[T]he plan enjoys broad support among environmental and business groups and represents a surprising consensus on an important issue in a city that thrives on debate." Ralph K.M. Haurwitz, *Travis County's Balcones Conservation Plan Takes Off*, Austin American-Statesman, May 4, 1996, at 2.

[5] Likewise, as has been pointed out by EPA in its comments regarding an amendment to Requirements for Authorized State Permit Programs under Section 402 of the Clean Water Act, citizens suits provisions are an important part of citizens' participation in a government permitting program. When citizens are barred from challenged state-issued permits because of restrictive standing requirements in state law, the public's ability to participate effectively in the permitting process is significantly "chilled:" "As EPA noted when it proposed today's rule on March 17, 1995 (60 FR 1488), when citizens are denied the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a State administrative agency is not addressing their concerns about 402 permits because the citizens have no recourse to an impartial judiciary, that perception has a chilling effect on all remaining forms of public participation in the permitting process. *Without the possibility of judicial review by citizens, public participation before a State administrative agency could become a paper exercise.*" Amendment to Requirements for Authorized State Permit Programs Under Section 402 of The Clean Water Act, 40 C.F.R. Part 123 (1996) (emphasis supplied)

The purpose of the ESA, as demonstrated through its text and its legislative history, is to set out a program whereby endangered and threatened species are conserved. Congress adopted a system which is to accomplish this purpose through (1) federal land acquisition of private property; (2) outright avoidance of adverse impacts on endangered species by the federal government; and, (3) prohibitions on the "taking" of endangered species by any person or entity.

Through its land acquisition program, the ESA reflects Congress' intent to avoid foisting off on individuals the whole burden of achieving the objectives of the Act, by requiring the federal government to condemn private property necessary to protect a species. Explaining the purposes of the land acquisition program, floor manager for the ESA, Senator Tunney, stated: "Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong. Rec. 25,669 (1973). Representative Sullivan, the floor manager for H.R. 37 -- the House version of the bill -- confirmed this approach:

> For the most part, the principal threat to animals stems from the destruction of their habitat. . . . Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but

> who are understandably unwilling to do so at excessive cost to themselves.

119 Cong. Rec. 31,062 (1973).

See also Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407, 2415 (1995), in which this Court discusses the purposes of the Section 5 land acquisition procedure is to allow the government to protect habitat before activity harms an endangered or threatened animal.

Other sections of the Act likewise reflect an attempt by Congress to protect private property rights. The consultation process under Section 7 can affect private landowners if a project or activity on private land requires some form of federal approval, such as a permit, or involves the expenditure of federal funds.

The habitat conservation planning process under section 10 provides a mechanism to address situations in which nonfederal projects or activities not requiring federal authorization or funding are in potential conflict with the protection of listed species; that is, such projects or activities may result in a prohibited taking of a listed animal or plant. Through this process, private landowners with activities or projects that may harm listed species can obtain a permit that allows the incidental taking of a listed species. *Id.*

To obtain an "incidental take" permit, the private landowner must develop a habitat conservation plan (HCP) -- a formal plan that specifies the effects that landowners' activities are likely to have on listed species, the measures that will be taken to minimize and mitigate these effects, the alternatives that the applicant considered and reasons why such

alternatives were not implemented, and any other measures the Service may require. (16 U.S.C. § 1539(a)(2)(A)(i-iv)).

B. PROTECTING PROPERTY RIGHTS AND ECONOMIC INTERESTS IS AN INTEGRAL ASPECT OF ACHIEVING PROTECTION OF ENDANGERED SPECIES.

As noted above, in 1973 Congress passed the Endangered Species Act which is today widely regarded as one of the most important and powerful environmental laws in the country. *See generally* M. Lynne Corn, Congressional Research Serv., *Endangered Species Act Issues* 1 (1992). Although a major component of the ESA is achieved by prohibitions placed on the federal government on public land ESA § 7, another large component of the ESA places prohibitions on certain actions by private individuals on privately owned land ESA § 9.

In fact, since one-half of the endangered species in this county live on privately owned land (and the habitat for endangered species is almost exclusively on private land), the ESA contains specific provisions discussed above that balance those private land and economic interests with the need to protect endangered species. *See* Hank Fisher et al., *"Building Economic Incentives Into The Endangered Species Act," Endangered Species Technical Bulletin* Vol. 19, No. 2, p. 4 (U.S. Fish and Wildlife Service 1994)

Contrary to the conclusion of the court below, as the Act itself reflects, Congress perceived protecting these private interests as being directly and critically related to the purpose of protecting endangered species. Indeed, no conservation

policy can succeed without the support of the regulated community.

Thus, as the Act clearly reflects, the likelihood of protecting endangered species is significantly increased when property rights and economic interests are respected. Moreover, examples of successful partnerships are well documented. *See Generally* PERC, *The Endangered Species Act: Making Innocent Species The Enemy* 12 (Jane S. Shaw ed., 1995).

And, despite the fact that this Court held shortly after the Act was passed that protection of endangered species were to be protected "whatever the cost" (*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978)), in practice endangered species recovery has proven to be very costly. Indeed, one of the most widely discussed impacts of the ESA is its cost. While no definitive study on the total economic impact of the ESA has been performed, U.S. Fish and Wildlife Service data reflect direct cost estimates[6] for only 306

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[6] According to the U.S. Fish and Wildlife Service, even these estimates do not reflect all costs:
"A good faith effort was made to develop species by species expenditures for this report. However, the information presented again this year does not reflect the total governmental (federal and state) effort toward threatened and endangered species conservation and presents an incomplete funding picture . . . A significant portion of . . . conservation activities at all levels include law enforcement, consultation, recovery coordination, and other actions that are not easily or reasonably funded by species. . . . Accounting procedures for staff salaries and operational, maintenance and other support services are not normally creditable towards individual species totals. Also, there exists significant variability among the various federal and state agency reports." "Federal and State Endangered

recovery plans of over $4 million (expressed in 1994 dollars). National Wilderness Institute, *Going Broke? Costs Of The Endangered Species Act As Revealed In Endangered Species Recovery Plans* (1994).

Looking at other government data pertaining to *all* species, the cost estimates are staggering. In 1990, the U.S. Department of Interior Inspector General estimated the potential future recovery costs for all endangered species to be over $4.6 *billion*. This figure was based on a conservative estimate by the Service based on a ten-year recovery plan. U.S. Fish and Wildlife Service, *Federal and State Endangered Species Expenditures: Fiscal Year 1990* (1991).

Recovery, of course, is only one aspect of endangered species protection. According to the Service, in 1992, for every one dollar spent by the Service on actual species recovery, $2.26 were spent by the same agency on related activities including permitting, consultation, enforcement and listing. U.S. Fish and Wildlife Service, *U.S. Department of the Interior Budget Justifications: Fiscal Year 1993* (1993). Other federal agencies, too, must spend money to comply with the Act. For example, in 1992 the U.S. Army Corps of Engineers spent $5.2 million to protect the California least tern. The Department of the Navy spent $.5 million that year on that same species.

Species Expenditures for Fiscal Years 1991, 1990 and 1989, U.S. Fish and Wildlife Service" (1992).

Indeed, in 1992, other federal and state agencies spent 5.4 times more on ESA compliance than the Service and the National Marine Fisheries Service, the two agencies primarily charged with implementing the Act.

Further, these figures do not include indirect costs borne by the private sector. Indeed, the court below's decision of particularly unfortunate given that one of the chief criticisms of the ESA is that the Act does has not been implemented in a way that adequately protects private property rights and economic interests. Assistant Secretary of Interior, Fish, Wildlife, and Parks, George T. Frampton, Jr., has testified that future enforcement "must reduce administration, economic, and regulatory burden on small landowners while providing greater incentives to conserve species." House Task Force on Endangered Species. (May 18, 1995).

Likewise, Environmental Defense Fund attorney, Michael Bean, recently told a group of U.S. Fish and Wildlife officials that "some private landowners are actively managing their land so as to avoid potential endangered species problems." PERC, *The Endangered Species Act: Making Innocent Species The Enemy* 8-9 (Jane S. Shaw ed., 1995). He emphasized that these actions are "not the result of malice toward the environment" but are "fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints." *Id.* Bean further described the actions as being a "predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others." *Id.*

Thus, while the Act as currently drafted reflects a need to protect economic interests and property rights, many believe that even greater protections should be contained in the Act. But, of course, the way to strike a different balance is through new legislation; not by judicial fiat.

CONCLUSION

The zone of interest test used to bar these Petitioners from enforcing certain provisions of the ESA has been held by this Court to be a prudential standard which bars only those plaintiffs whose interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 399-400 (1987)(footnote omitted).

Here the interests of Petitioners are central the purpose of the ESA and the citizen's suit provision gives them explicit standing to bring suit to protect those interests. Hence, the *amici curiae* strongly urge this Court to reverse the decision below.

Respectfully submitted,

Nancie G. Marzulla
Lisa M. Jaeger
Barry C. Hodge
DEFENDERS OF PROPERTY RIGHTS
6235 33rd Street, N.W.
Washington, D.C. 20015
202-686-4197
Counsel for *amici curiae*

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